Coca-Cola Bottling Co. of Dubuque, Iowa *and* William R. Winter, Jr., Petitioner and General Drivers and Helpers Union Local No. 421 a/w International Brotherhood of Teamsters, AFL–CIO. Case 33–RD–635

August 25, 1995

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered the objections to an election held on June 24, 1994, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows three for and seven against the Union, with no challenged ballots.

The Board has reviewed the record in light of the Union's exceptions and brief, and hereby adopts the hearing officer's findings and conclusions only to the extent consistent herewith.

The hearing officer overruled all of the Union's objections and recommended that the results of the election be certified. The Union excepts to the hearing officer's recommendation to overrule Objection 2, contending that the Employer engaged in election misconduct by an implied promise to grant benefits if the employees voted against the Union. We agree with the Union's contention.

A. *Pertinent Facts*

During the 10 days prior to the decertification election, the Employer held four to five special meetings with the bargaining unit employees. At one meeting,Regional Manager for Human Resources Bill Cahill, distributed documents, which on their face indicated they were prepared June 8, 1994, and which compared benefits of bargaining unit employees with those of nonbargaining unit employees. In addition to a comparison of the nonbargaining and bargaining unit health plans, the materials included a pension comparison, a benefit cost and tax comparison, and five estimates of retirement savings under a 401-K plan that was not currently available to union employees. All these documents were prepared specifically for each individual employee using the appropriate salary, age and withholding exemptions for that employee. The projections of retirement earnings under the 401-K plan varied based on two different retirement ages, two different rates of returns and three different savings rates. Cahill told the employees to take the comparisons home and show their spouses.

At a subsequent meeting, Cahill conducted a slide show presentation and answered questions from employees about benefit comparisons in the Employer's printout given to them the previous day. He told the group that employees who belonged to the Union could not participate in the employer's 401-K plan. It was also common knowledge that nonunion employees companywide and at the worksite received these benefits and participated in the 401-K plan. Finally, the record shows that, after receiving the documents, some employees asked additional questions of the Employer including one employee who testified he met privately with Cahill, who had made himself available for that purpose.

B. *Discussion*

The hearing officer found that the Employer's conduct did not create an implied promise of benefit to the employees. He found the case to be more like *Viacom Cablevision of Dayton*, 267 NLRB 1141 (1983), in which the Board found wage comparisons between union and nonunion worksites nonobjectionable, than like *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979), in which the Board found an implied promise in the employer's distribution of individually tailored comparisons of pension benefits. We disagree.

It is well settled that an employer may lawfully inform employees of the wages and benefits its nonunion employees receive and respond to requests for information from employees about such benefits.[1] The Board will set aside an election, however, where an implicit promise of substantial benefit to employees is made, because such a promise is deemed to interfere with employees' free choice in that election.[2]

We believe that the Employer's conduct here amounted to an implicit promise. Initially, we note that the comparisons of bargaining and nonbargaining benefits given to the unit employees were unsolicited.[3] The hearing officer credited the testimony of two employees that they did not request the information. Furthermore, there is no direct evidence that any em-

[1] See *Duo-Fast Corp.*, 278 NLRB 52(1986); *Viacom*, supra. See also *Weather Shield Mfg.*, 292 NLRB 1 (1988) (a promise to maintain the status quo is not misconduct); *Best Western Executive Inn*, 272 NLRB 1315 (1984) (employers can answer questions and respond to employee requests for information); *KCRA-TV*, supra (same).

[2] See *Etna*, supra; *Lutheran Retirement Village*, 315 NLRB 103 (1994).

[3] Whether or not information has been solicited by employees has been one of the factors the Board has considered in deciding whether there has been an implied promise of benefit. In *Viacom* the Board noted the wage comparisons were distributed as a result of employee requests. *Viacom*, supra at 1141 & fn. 3. Recently the Board found an implied promise when an employer at a preelection meeting with employees ''sua sponte volunteered unexpected information,'' concerning the employer's interest in offering a pension plan. *Lutheran Retirement Village*, supra.

ployee requested this information from the Employer before the materials were prepared on June 8 and distributed. Indeed, the Employer failed to present as witnesses any company official indicating the documents were prepared in response to employee requests, or for that matter indicating why the documents were prepared and when they were distributed.[4] In these circumstances we find that testimony of general employee interest in the information after it was distributed or of discussions at union meetings, as described in fn. 4 above, does not establish that the Employer was responding to requests.

The record also shows that the Employer was ''doing more than just 'comparing' nonunion benefits.'' Thus, the Employer provided comparisons of benefits that were detailed and elaborate, consisting of several pages of hypothetical figures individually tailored to the employee's age and salary level, as well as five estimates of retirement savings under the 401-K plan, all displaying the employee's name. Such documents, accompanied by the slide show presentation and the willingness of a high-level manager to meet individually with employees, make the Employer's conduct more like the employer's preparation of individual pension comparisons involving IRAs found objectionable in *Etna*, than like the wage comparisons found nonobjectionable in *Viacom*.[5]

The speculative nature of the 401-K estimates is in marked contrast to the comparisons distributed in *Viacom*, which consisted of ''statements of historical fact'' describing nonunion wages paid at different company locations in the past. Here, the Employer distributed future-oriented projections as to what a given employee would collect assuming various savings rates, rates of return, retirement ages, salary growth and employer contribution.[6] With the exception of the percentage the Employer at that point committed to contribute, none of the numbers could be certain. The hearing officer's finding that these documents did not ''rise to the level of extraordinary effort given the various computer programs available today,'' focuses exclusively on the Employer's time and effort assumed to be involved in preparing the documents and fails to account for employees' reasonably foreseeable reaction to a presentation of elaborate multiple alternative scenarios tailored to each employee. Employees could reasonably believe that the Employer would not go to such lengths if it were not intending to bestow the benefits upon the employees as soon as they voted to decertify the Union.

Finally, we note that the Employer did not offer any type of disclaimer to counter the clear impression of a promise of benefit. Since the comparisons and retirement projections were distributed in a context in which employees might be expected to know that the 401-K plan was available to nonunion employees, we are left to conclude that the Employer's presentation here was intended to alert the employees to, or reinforce, the ''distinct possibility'' that they were being promised the nonunion health and 401-K plans. Compare *Duo-Fast Corp.*, supra; *Viacom*, supra.[7]

In sum, because the Employer, without a request by employees, presented elaborate individualized benefits comparisons and 401-K projections to each employee, and made no effort to deny it was promising such benefits should the employees vote out the Union, we find that the Employer's conduct constituted an implied promise of benefit which warrants setting aside the election and directing a second election.

[Direction of Second Election omitted from publication.]

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[4] On cross-examination two employee witnesses testified that before the documents were distributed the 401-K plan was discussed at a union meeting and also that some employees (although neither of the two witnesses) had asked questions about the 401-K plan. However, there is no evidence that the Employer became aware of the union discussion before the information was distributed, nor is there any indication of the occasion on which questions were asked and of whom.''

[5] Compare *Dallas Morning News*, 285 NLRB 807 (1987), where the Board dismissed an 8(a)(1) allegations against an employer who circulated a notice about a sick pay plan excluding those covered by the collective-bargaining agreement. The Board reasoned that an employer can provide accurate descriptions of the details and scope of all its existing nonunion employee benefits so long as there are no allegations of bargaining in bad faith. Id. at 808–809. The Employer here did more than just accurately describe existing nonunion benefits, however; it did exactly what *Dallas Morning News* proscribed in distinguishing its facts from those in which it would find a violation: it used the presentation of the material as a ''device to defeat the Union by implicitly promising benefits to be accorded if the unit employees voted to decertify the Union.'' Id. at 809.

[6] The example in which the Employer assumes a 10-percent employee savings rate and an 8-percent rate of return yields a retirement fund of over $800,000.

[7] In finding the Employer's conduct unobjectionable, our dissenting colleagues argues a position at odds even with that of the Employer. Contrary to our dissenting colleague, we find nothing in the record establishing that the 401-K plan was ''automatically available to non-unit employees without the necessity of some decision by the Employer to extend it to employees who were no longer in a collective-bargaining unit [emphasis added].'' Indeed, it is clear that it was the Employer's position that it was not promising the 401-K plan to the unit employees. In that regard, at the hearing, it elicited an affirmative response from employee Paul Green to the following statement, ''And at [no] time during any of those meetings did anyone [from the Employer] promise you that you would get 401(k), the health insurance or any other benefits there were available to nonrepresented employees of Coca-Cola Enterprises.''

We have, however, rejected the Employer's position and found an objectionable implicit promise of benefits in this case.